SUPREME COURT OF THE UNITED STATES.

December Term 1868.

No. 91.

The Town of Beloit,
Appellant,
vs.
Samuel C. Morgan.

} APPEAL IN CHANCERY.

No.

The Town of Beloit,
Pl'ff in Error,
vs.
Samuel C. Morgan.

} WRIT OF ERROR.

Brief for Respondent and Defendant in error.

MATT H. CARPENTER,
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WRIT OF ERROR.

The first of the above entitled causes is an appeal from a decree in the Circuit Court of the United States for the District of Wisconsin, dismissing a bill exhibited to restrain the prosecution of the action at law.

The second is a writ of error to reverse the judgment at law, which was rendered after the dismissal of the bill.

Both causes are ordered to be argued together as one cause.

The action at law was to recover upon certain coupons attached to bonds issued to the town of Beloit, in pursuance of chapter 12 of the Private and Local Laws of the State of Wisconsin, enacted in 1853. *The act is set out in the Record at pages* 1 *and* 2.

The election provided for by the act was held April 7, 1853; the vote being in favor of issuing the bonds, the supervisors subscribed for the stock $100,000, May 21, 1853; the subscription was accepted by the company October 7th, 1853, and the town delivered $100,000 bonds of said town to the railroad company in payment. The bonds were dated May 21, 1853, and payable February 10, 1873, twenty years from the day the act took effect. *Record page* 20. The railroad company delivered the bonds to the contractors, Fisher, Keep, Talcott & Co., at 95 cents on the dollar, in payment for grading the road. *Record page* 60. The plaintiff, a subsequent purchaser and *bona fide* holder of some of these bonds, commenced actions at law on matured coupons attached to said bonds; and the town exhibited this bill to restrain these actions at law and to cancel the bonds. After full hearing upon pleadings and proofs, the Court below dismissed the bill, and the town appeals to this Court.

The objections to the validity of the bonds as made by the bill are the following:

(1.) That the complainant is not a *bona fide* holder of the bonds and coupons in suit.

(2.) That the act under which the bonds were issued had not been published *by the state printer*; and therefore was not in operation at the time the election was held.

(3.) That the bonds are usurious and void because they were issued May 21, 1853, drawing interest from February 10, 1853.

(4.) The bonds were not issued in pursuance of the act, because they were issued May 21, 1853, payable in twenty years from the passage of the act, instead of twenty years from the date of the bonds.

(5.) That the Racine, Janesville and Mississippi Railroad Company was not authorized to construct a railroad from the city of Racine to the village of Beloit.

These objections, I shall consider, in their order.

I.

The complainant is a *bona fide* holder of the bonds. See answer, Record page 30. This answer was required to be and is on oath; and is not contradicted by any witness. On the contrary. the answer is fully sustained by the testimony of J. J. Bushnell, Record page 52. Again the testimony shows that the railroad company paid the bonds to Fisher, Keep, Talcott & Co., before their maturity, at 95 cents on the dollar; *Record page* 60. This made Fisher, Keep, Talcott & Co. *bona fide* holders of the bonds, and the defendant would be protected *as a purchaser from* a *bona fide* holder; even if he were not such holder himself.

II.

It is objected that the act under which the bonds were issued had not been published by the State Printer and therefore was not in operation at the time the election was held.

There are several answers to this objection.

(1.) The act was a private act, and was in force from its passage without publication. This was the doctrine of the Supreme Court of the State of Wisconsin when these bonds were issued.

Hewitt v. Grand Chute, 7 *Wis.*, 282.

The subsequent decisions of that Court, cannot affect the validity of these bonds.

Havemeyer v. Iowa Co. 3 *Wallace*, 294.

(2.) The act provided for its own publication in a newspaper, with the notice of the election, in a newspaper printed in the village of Beloit ; and the act was so published, as this Court must take judicial notice.

This publication was sufficient ; even if this Court had not already decided that no publication whatever, was necessary to the validity of the act.

Clark vs. Janesville, 10 *Wis.*, 184.
Bushnell vs. Beloit, 10 *Wis.*, 195.

III.

It is further objected, that the bonds are usurious and void, because they were issued May 21, 1853, drawing interest from Feb. 10, 1853.

(1.) The answer of the defendant says: "That the cou-
"pon attached to each of said bonds, maturing February

"10, 1854, was for a less amount than one years interest, "and was for just the amount of interest which would "mature on said bonds respectively, from their respec- "tive dates to said 10th day of February, A. D. 1854." This averment of the answer being uncontradicted by any witness, is conclusive of the fact, and shows that the bond called for no extra interest, after its date and delivery.

(2.) The proof shows that when the town delivered the bonds to the railroad company, the company agreed with the town to pay the interest which should mature on the bonds, until the road should be completed to Beloit; which was then expected to be about two years

Record 67.

Record 64.

And that *in pursuance of this agreement*, the company *cut off and cancelled* the coupon which was to mature February 10th, 1854. This was done by the company in pursuance of this agreement, before the bonds passed into market; and the town has never paid, and can never be called on to pay any interest for more than nine months after the bonds were actually delivered to the Company in payment of the town's subscription to the stock of the Company.

This absolutely negatives the pretence of a corrupt and illegal agreement between the town and the company, that the Town should pay more than seven per cent. interest from the date and delivery of the bond, until Feb. 10th, 1854. On the contrary the agreement was that until that time and after, *it should pay no interest whatever.*

(3.) Again here was no loan of money by the Rail-

road Company to the town, direct or indirect. The town purchased so much stock, and paid for it with its negotiable bonds. A violation of the statute against usury cannot be committed in such a transaction; as it lacks the essential element—a loan of money.

(4.) These bonds were made payable in New York. The law of that state, is therefore the law of the contract, in regard to usury.

2 Par. Cont. 95 to 100.
Boyce & Henry vs. Edwards. 4 Pet., 123.

This Court takes *judicial notice* of the laws of New York, and therefore the statute need not be set out in the answer of the defendant.

Pennington vs. Gibson, 16 How. 65.

By the law of New York, no corporation can set up the defence of usury. The Courts of New York, construing this statute, have decided that the statute against usury is repealed by this act, as regards contracts made by corporations.

Butterworth vs. O'Brien, 23 N. Y., 276.

(5.) This being a bill in equity to restrain actions at law on the bonds and to cancel the securities, it could not be maintained, (if there were no other objections) because it contains no offer to pay the principal sum, or any sum whatever. In these cases the law requires a party who seeks the aid of a Court of Equity to do equity, by offering to pay the principal sum and legal interest.

Fanning vs. Dunham, 5 J. Ch., 122.
Campell vs. Morrison, 7 Paige, 157.
Livingston vs. Harris, 3 Paige, 568.
Meshke vs. Van Doran, 16 Wis, 390
2 Parsons Cont p. 403.

IV.

The next objection is that the bonds were not issued in pursuance of the act, because they were issued and dated May 21, 1853, payable in twenty years from the date of the act, instead of twenty years from the date of the bond.

(1.) The act provided that the bonds shall not be issued until the result of an election upon that question shall be ascertained ; and provides that if the bonds are issued they shall be payable "*in twenty years.*"

Twenty years from what time?

We claim, in twenty years from the time the act took effect, and that the town had no authority under this act to issue bonds which should not mature *within twenty years from the date of the act*. Had it been the intention of the Legislature to allow the bonds to be made payable in twenty years *from the date of the subscription*, or *from the day the bonds should actually be issued*, it would have been so expressed. The construction put upon the act by the other side, is equivalent to engrafting one of these qualifying phrases, or limitations upon the act, which a Court has no right to do. When an act provides that a certain thing shall be done within a certain number of years ; it means from the time when the act takes effect ; and can mean nothing else.

V.

The last objection is, that the Racine, Janesville and Mississippi Railroad Company was not authorized to build a railroad from the city of Racine to the village of Beloit; therefore the town was not authorized, in any event, to deliver bonds to that company.

In Bushnell vs. Beloit, 10 Wis., 195, this objection was much insisted upon; and although not noticed in the opinion of the Court, was nevertheless overruled by the judgment in that case. I repeat here from my brief in that case, the substance of the reply then made to this objection.

The company was clearly authorized *by its charter* to build such road.

The charter of the company was for building a road from "The city of Racine, in the county of Racine, via "the village of Janesville, through the counties of Rock, "Green, La Fayette and Grant to the Mississippi river," &c. Chap. 392, Laws 1852.

The company therefore was authorized to build its road through such parts of these counties, touching such business points and places as might be for the interest of the company, provided they also connect Racine, Janesville and the Mississippi river. It has always been understood in this country by legislatures and courts, and everybody else, that a railroad need not be built on a tangent; and that departures from a right line might not only be made to escape inequalities of ground, rivers, lakes, marshes, and other places where it would be expensive to build a road; but also to accommodate the

cities and villages on its general route. Probably a railroad built on a right line from Racine to Janesville would not pass through a single village, but would leave them on the right and on the left, all unaccommodated, and the road worthless. Such mathematical construction of legislative enactments, can hardly be tolerated. If the argument is good in one case, it must be in the other, for the least departure would be as fatal as the greatest.

We submit, that even if the company had not been authorized by strict construction of its charter to build a road to Beloit, yet as it has done so, and the town has had the full consideration of its subscription, that no one but the state can question the right of the company to build the road. That a delinquent debtor of the company or its assignee, cannot call the company to account for a violation of its charter, and virtually change the issue from the indebtedness of the defendant to a *quo warranto*.

Banks vs. Poiteaux, 3 Rand., 136.
Chester Glass Co. v. Dewey, 16 Mass., 102.
R. & B. R. Co. v Proctor, 29 Vt., 93.
Hamilton v. The An. R. R. Co., 1 Md. Ch. Decis, 107.
Canal Co. v. Railroad Co., 4 Gill and J., 1.
Redfield on Railways, 105 and note.

Again an amendment of the railroad charter was passed July 9, 1863. (Private laws 1853, page 830,) as follows :

"The Racine, Janesville and Mississippi Railroad Com-
"pany are hereby authorized *to connect* their railroad *at*
"*Beloit* with any railroad or branch railroad now charter-
'ed, or which may hereafter be chartered in the State
"of Illinois, and shall have power to operate their rail-
"road in connection with such road," &c.

This language assumes that the company was authorized to build a road to Beloit, otherwise it could not connect *at that point* with another road. It does not purport to change the route as fixed by the original charter. The company could thereafter have built to Janesville and thence to the Mississippi river, through the counties of Rock, Green and Grant. But the language of the act admits or implies a previous right in the company to have a road running to Beloit ; and the act authorizes a connection at that point with a road running in Illinois, without impairing the right of the company to thereafter build the balance of its road on the route originally chartered.

This amendment was passed July 9, 1853, and the subscription of the town to the capital stock of the company was not accepted by the company, and the bonds were not issued to the company until October 7, 1853, three months after this amendment was a law. Record, pages 61 and 72 ; and there can be no question that the company was authorized to build a railroad to Beloit after the amendment ; even if not so empowered by its original charter.

VI.

But a perfectly conclusive answer to all the foregoing objections as to the validity of the bonds remains to be considered. The subscription of the town was accepted by the railroad company, and the bonds actually delivered in payment, October 7, 1853.

Record, 61, 72.

It is admitted that these are the only bonds ever issued by the town to aid any railroad company.

Record page 59.

In 1856 the legislature of Wisconsin chartered the city of Beloit, over a portion of the territory of the former town of Beloit ; and speaking of these very bonds, for no others had ever been issued, the legislature provided, (Pr. Laws, 1856, p. 991):

Sec. 17. "*All principal and interest upon all bonds which have heretofore been issued by the Town of Beloit for railroad stock* or other purposes SHALL BE PAID *when the same or any portion thereof shall fall due,* by the City and Town of Beloit, in the same proportions as if said town and city were not dissolved," &c.

In 1857 the city charter was amended and the above provision was re-enacted.

Pr. Laws 1857 p. 437.

It is a well settled principle that where a contract has been entered into by any person which is tainted by any illegality—*as usury,* it is in the power of the Legislature *to cure the defect and make it a legal contract.*

Wilson vs. Hardesly, 1 Md. Ch. Decis. 66.
Satterlee vs. Mathewson, 2 Pet. 411, 412.
Watson vs. Mercer, 8 Pet. 108.

Or when any corporation exceeds it legal powers in

making any contract, a subsequent act of the Legislature cures the defect.

Shaw vs Norfolk County R. R. Co. 5 Grey 178.
Gelpcke vs. Dubuque, 1 Wallace 220, No. 81.

These two subsequent acts of the Legislature, sweep away all defence to those bonds, on the ground of usury illigality, or want of authority in their issuance. Compare these acts, passed in reference *to these identical bonds*, with the act which the Supreme Court of the United States in the case last cited, held sufficient to cure the bonds there in suit. See act in plaintiff's argument in that case, p. 3 ; and Justice Miller's dissenting opinion, 1 Wallace 397. Here, there can be no question, the act of 1856, and the act of 1857, referred to those very bonds ; and the Legislature twice say, "*All interest and* "*principal on these bonds* SHALL BE PAID."

See Society, &c. vs. Pawle t4 Pet. 501, where the Court held the mere naming of a corporation was a recognition of the legal capacity of such corporation.

Not only the Legislature, but the Supreme Court of our State say, that these bonds are valid and shall be paid.

Bushnell vs. Beloit, 10 Wis. 95.

In the case last above cited, the action was on coupons of these very bonds. Every objection here urged against the validity of the bonds, though not noticed in the opinion of the Court, were patent upon the record, and are precluded by the judgment.

VII.

The judgment at law rendered in favor of this defendant against the town on certain coupons from this issue of bonds, was, and is an estoppel between the same parties as to the vilidity of the bonds.

VIII.

If I have succeeded in answering the above objections to these bonds, then the bonds are valid,and the judgment at law rendered by the Court below, in the case Morgan v. Beloit, must be affirmed.

MATT. H. CARPENTER,
Counsel for Respondent,
and Defendant in error.

United States Supreme Court

DECEMBER TERM, 1868.

THE TOWN OF BELOIT, Appellant,
vs. } No. 97.
DANIEL C. MORGAN.

THE TOWN OF BELOIT, Plaintiff in Error,
vs. } No. 98.
DANIEL C. MORGAN, Defendant in Error.

Brief for the Appellant and Plaintiff in Error.

H. L. PALMER,
K. G. RYAN.

Milwaukee Daily News Steam Print.

Supreme Court of the U. S.

THE TOWN OF BELOIT,
Appellant,

vs.

SAMUEL C. MORGAN.

No. 91. Dec. T., 1868.

THE CASE.

This is an appeal from a decree of the court below, dismissing the appellant's bill on final hearing upon pleadings and proofs.

The bill states an act of the Legislature of the State of Wisconsin authorizing the supervisors of the town of Beloit to subscribe to the capital stock of a railroad company authorized to construct a railroad *from the city of Racine to the village of Beloit*, and to pay for the same in the bonds of the town payable *in twenty years*, with interest payable annually, *not exceeding seven per cent.*, approved February 10, 1853. The bill, Record 1.

That the act was a general and public law requiring publication before it should take effect, according to the Constitution and laws of the state, and that it was not so published until October 4, 1853.

That the Supervisors of the town, assuming to execute the authority so conferred, May 21, 1853, subscribed to the capital stock of the Racine, Janesville and Mississippi railroad company, to be paid in bonds according to the act.

That such railroad company was a corporation created by an act of the Legislature, passed April 17, 1852, with authority to construct a railroad "from the city of Racine, via the village of Janesville, through the counties of Rock, Green, La Fayette, and Grant, to the Mississippi river;" and was at the time of the subscription to its capital stock, and of the execution and delivery of the bonds in payment therefor, not authorized to construct a railroad from the city of Racine to the village of Beloit.

That at the time of making the subscription, the supervisors, acting in the name of the town, entered into an agreement in writing with the railroad company, dated on the same day, reciting the subscription and containing agreements of the railroad company; 1. Not to sell the bonds for less than ninety-five cents, without consent of the Supervisors; 2. That the amount of the subscription should be, as soon as realized, expended on that portion of said railroad commencing at Beloit and running east to Delavan; 3. That the railroad company should pay the interest on the bonds until the railroad should be completed to Beloit. 4. That the stock so subscribed for should be entitled to at least one director; and 5. That the stock should in no case be merged in the stock of any other road, branch or corporation whatever, without the consent of the town or an offer of the railroad company to take the stock at not less than par.

That in payment of the subscription, October 7, 1853, bonds were made and executed by the officers of the town and delivered to the railroad company, dated February 10, 1853, and payable February 10, 1873, part for $1,000 each, and part for $500 each, with interest at the rate of seven per cent per annum, payable annually on the 10th day of each February, until the principal sum should be paid, with twenty coupons or interest warrants attached to each bond,

payable on the 10th day of February in each of the twenty years, for seven per cent on the principal sum; the first coupon being payable February 10, 1854; a copy of the bonds and coupons is annexed as an exhibit to the bill, to be found at page 20 of the record. That the bonds are payable in nineteen years, eight months and twenty days after date and in nineteen years, four months and three days after delivery; were made without any legal authority; were in violation of the pretended authority of the said act of the Legislature; and were in violation of and contrary to the provisions of the act of the Legislature approved May 10, 1851, then in force entitled "an act to limit the rate of interest," and constituted a corrupt and usurious contract.

That the defendant is the owner of a large amount of the bonds and coupons so made and issued, and has brought in the court below four several actions at law, and threatens to bring others, to enforce the payment thereof against the appellant. That at the time the defendant purchased the bonds and coupons so held by him, he had notice that the act of February 10, 1853, authorized only a subscription to the stock of a company authorized to construct a railroad from Racine to Beloit, and that the R. J. & M. R. R. Co. was not then authorized to construct such a road, and that the act authorized the issue only of bonds payable in twenty years from the date of subscription, or of the actual delivery of the bonds, and that the appellant had no authority whatever to issue bonds for any other purpose or payable in any other time, and that the bonds were actually executed and delivered as in the bill is stated, and that there was no authority to issue bonds at a greater rate of interest than seven per cent. per annum, and that the bonds in fact were issued at a greater rate of interest, and reserved seven per cent. interest for three months and eleven days longer than the bonds had to run, from their date, and for seven months and twenty-seven days longer than the bonds had to run from the time they were actually executed and delivered, and that they were actually executed and de-

livered on the terms and conditions of the agreement of May 21, 1853; and that he purchased the bonds after one or more years interest had accrued thereon and remained unpaid, with the overdue and unpaid coupons attached thereto; and that he purchased them at greatly less than their par value, and is not a *bona fide* holder for valuable consideration.

The bill prays that the defendant may be decreed to deliver up to the appellant, the bonds held by him, specifically described in the stating part and in the prayer, with the interest warrants appertaining thereto, already matured and to mature, to be cancelled; and that they may be decreed and declared illegal, usurious, invalid, and void; and that the defendant may be perpetually enjoined from proceeding in the actions already commenced and from commencing any other actions, on the bonds and coupons, and from selling them, and for general relief.

The answer, Record 28.

The defendant answered, admitting the passage of the act of February 10, 1853, claiming it to be a local act in force without publication; the subscription to the capital stock of the railroad company, and the payment therefor in the bonds; and that the copy of the bonds and the coupons attached to the bill is correct, except that the coupon maturing February 10, 1854, was for less than a year's interest, and was for the amount of interest properly accruing from the date of the bonds to the date of payment; but denies all knowledge or information, sufficient to form a belief, when, or in what manner, or under what precise arrangement, the subscription was made and the bonds issued, and neither admits or denies the averments of the bill in that behalf.

The defendant denies actual knowledge of the precise powers of the railroad company, but is informed and believes that it had full authority to construct a railroad from the city of Racine to the village of Beloit before February 10, 1853, and from thence to the making and payment of the subscription of stock, and that the appellant had authority

to make the subscription and issue the bonds, and that they are legal and valid.

That the defendant purchased his bonds and coupons *bona fide* and for value, in due course of business, in the full belief that they were valid and negotiable instruments binding upon the appellant, and without notice of any of the matters set up in the bill against them; specifically denying knowledge or information, or reason to suspect, that the act of February 10, 1853, only authorized the appellant to subscribe to the stock of the company then authorized to construct a railroad from Racine to Beloit, and any actual knowledge whatever in regard to that act, except information from the bonds themselves and the certificate attached thereto, that the bonds were issued in pursuance of an act of the Legislature; denying notice that the railroad company was not authorized to construct a railroad from Racine to Beloit; denying notice of all the details stated in the bill in regard to the subscription and execution of the bonds; and denying that when he purchased the bonds, any coupon maturing February 10, 1854, was attached thereto.

That the defendant is a citizen of Connecticut not conversant with the laws of Wisconsin, and purchased the bonds, regular on their face, calling for seven per cent. interest, upon the representation of the seller that the bonds were valid and legal and would be paid.

That after the issue of the bonds, the Legislature of Wisconsin, March 31, 1856, passed an act to incorporate the city of Beloit, which provided that all principal and interest upon all bonds theretofore issued by the appellant, for said railroad stock or other purposes, should be paid by the city and town of Beloit as if the said town and city were not dissolved. And that afterwards the Legislature passed another act, March 3, 1857, amending the former act, and re-enacting the same provision; and that it was the intention of the Legislature to provide by those acts that the bonds in question should be paid; and that those acts are a Legislative ratification of the bonds, with effect to cure any irregularity or want of authority.

That the appellant, after the issuing of the bonds, appointed a commissioner under the act of February 10, 1853, to vote for directors of the railroad company, and refused to sell its railroad stock, and never pretended a defence against the bonds until after the railroad stock had became worthless.

That, December 22, 1860, the defendant commenced an action at law against the appellant in the District Court, wherein he recovered judgment, January 19, 1861, whereof he attaches to his answer a copy of the record; by which it appears that the action was brought upon coupons of the bonds in question, and that the defendant filed a plea in abatement, which was stricken from the files as a nullity, and judgment recovered by the defendant. And the defendant insists upon that judgment, by way of estoppel, as conclusive of the validity of the bonds and coupons, as if he had pleaded the same.

Replication. To this answer the appellant put in a general replication.

Proofs. Record 48. The proofs established an election under the act of February 10, 1853, held April 7, 1853, by which the electors of the town voted to subscribe to the capital stock of a railroad company *authorized to construct a railroad from the city of Racine to the village of Beloit*, and to pay for the same in the bonds of the said town according to the terms of the act. *Record* 68. A subscription, under that authority, by the Supervisors to the stock of the R. J. & M. R. R. Co. on May 21, 1853, and the agreement of that date stated in the bill. *Record* 67, 57. A resolution of the Supervisors authorizing the execution of the bonds in payment of the subscription, passed October 5, 1853, and the delivery of the bonds to the railroad company October 7, 1853. *Record* 72. That the bonds in question were the only railroad bonds issued by the town. *Record* 59. That the bonds were all executed and delivered to the railroad company with twenty annual coupons, for interest at seven per cent., the first coupon maturing February 10, 1854. *Record* 59. That the railroad company cut all the coupons off the bonds before

disposing of them, under the contract with the railroad company to pay the interest accruing on the bonds until the road should be completed to Beloit. *Record* 60. That otherwise, the town never paid any of the coupons. *Record* 54. That $85,000 of the bonds (the whole amount being $100,000) were paid at ninety-five cents on the dollar, by the railroad company, to their contractors. *Record* 64. That the defendant's bonds were acquired from or through these contractors; having been pledged by them, or others, to a bank of which he was president, and where the dishonor of the coupons was known. *Record* 51 to 55. And the parties stipulated that the village of Beloit is situated on the Illinois line, fourteen miles due south of Janesville, and that a map of the state might be used on the argument. *Record* 58.

The defendant gave some testimony tending to show confirmation of the bonds. *Record* 66, 70, 74, 75, and 76.

This is believed to be as full a statement, as is necessary to the consideration of the questions involved, of the pleadings and proofs in this cause.

POINTS FOR THE APPELLANT.

I.

EQUITY WILL ENTERTAIN AND GIVE RELIEF ON SUCH A BILL.

The bill seeks discovery of the defendant's notice of the want of authority of the officers of the town to issue the bonds. But it may be doubted whether, upon that ground alone, the bill could be maintained as a bill for relief.

The bill is not strictly a BILL OF PEACE. But it partakes largely of the character of that class of bills. It is brought after suit institutited at law. It cannot be said, perhaps, to be framed to establish a right; in strictness of language, it is rather framed to prevent a wrong. But as right and

wrong are reverse terms, he who files a bill to resist a wrong, may well be said, in liberal use of terms, to do so to establish a right.

The bill is indeed filed against a single defendant. That was a necessity of the case. But it is against a defendant who has already brought several suits, and to whom the bonds and coupons furnish multitudinous apparent rights of action. And it is difficult to see why, if a BILL OF PEACE will lie to establish a right against a great number of persons, it should not lie against one person who brings and threatens a great number of actions in one right. A BILL OF PEACE, like a bill QUIA TIMET, is a preventive process against litigation at law.

In this case, even were the defence perfect at law, judgments at law would not protect the appellant. Judgments for the appellant might bar the coupons, but could not cancel them, nor prevent them from circulating from hand to hand, with apparent rights of action in every holder. And this bill is brought to cancel, in one man's hands, a large share of the four thousand and odd apparent rights of action arising on these bonds and coupons. Here certainly the principle of a BILL OF PEACE applies, and the court which establishes a right against a great number of persons, in one bill, to avoid litigation, will certainly arrest in one defendant's possession a great number of wrongs, capable of being scattered as apparent rights of action, amongst a great number of persons; both upon precisely the same principle.

But the bill here partakes more largely of the character of a bill QUIA TIMET; and comes more strictly under the subdivision of the latter class of bills for the rescission, cancellation or delivery up of instruments. Indeed it would be technically a bill of that class, if some doubt were not raised by the modern rule of decision, that such a bill will not lie for the cancellation of an instrument void upon its face.

We will not here discuss the question whether the nullity of the bonds appears upon their face. It is sufficient in defence of the bill, in this aspect, to say that the nullity of the

coupons does not; and that if otherwise, the bill is removed from that objection, by being also in the nature of a BILL OF PEACE. And indeed if a bill will lie, notwithstanding the principle in question, as was held by the English Court of Chancery, in the case of forged instruments; it certainly ought to lie, notwithstanding the principle, in the case of municipal obligations, executed by officers without authority. If it can be said in either case that the nullity appears upon the face of the instrument, it can be said in the other; for the false and unauthorized signatures are alike in principle.

These two classes of bills rest, in several particulars, upon the same principles. It is often difficult to distinguish to which of the two classes a bill properly belongs. And it often happens, as in this case, that a bill 'partakes largely of both descriptions, in the liberal adaption of remedies favored by equity jurisprudence.

Redfield's Story's Equity, sec. 826, 852, 853, 854, 692 to 701.

And this may be called a bill for discovery and relief, partly in the nature of a BILL OF PEACE and partly in the nature of a bill QUIA TIMET.

The only objection to the bill made by the defendant, in the court below, was that it contained no offer to pay the principal sum. This objection was made incidentally, in discussing the question of usury, and the authorities quoted all related to bills filed for relief against usurious contracts.

It is sufficient answer to the objection, in that connection, to say, that if the bonds are usurious, they are so by chap. 172, of the laws of 1851, which (sec. 4.) makes usurious contracts void, and (sec. 6) provides that courts of equity shall not require payment of the principal or any part of it, as a condition of relief against usury. And although the act of 1851 is repealed, that continues to be the rule in cases arising under it.

Simonton vs. Vail 11 Wis. 90.

In bills QUIA TIMET for the recission or specific performance of contracts, both placed upon the same ground of

jurisdiction and both resting upon the same principles, courts of equity exercise a sound discretion in granting relief, and impose their own terms upon the plaintiff; and if he refuse to comply with them, dismiss his bill. Here it would be not only not necessary, but improper, for the plaintiff to assume to tell the court what the terms of relief should be. That is for the court to say, not for him.

Story's Equity sec. 693.

II.

THE BONDS IN QUESTION WERE NOT AN EXECUTION OF THE AUTHORITY GRANTED BY THE ACT OF FEBRUARY 10, 1853, AND WERE EXECUTED BY THE OFFICERS OF THE TOWN WITHOUT AUTHORITY OF LAW.

Notwithstanding the leaning of this court, to overrule objections against the validity of municipal bonds, we believe it has never been doubted here, that there must be specific legislative authority to give validity to such bonds. That was the very point decided in *Aspinwall vs. Daviess*, 22 *Howard*, 364, and is recognized in *Knox Co. vs. Aspinwall*, 21 *Howard*, 539, and in all the subsequent decisions of the court upon the subject, especially in *Thomson vs. Lee County*, 3 *Wallace*, 327.

In *Knox vs. Aspinwall* the court says: "our chief inquiry, therefore, will be whether or not, these several obligations were executed and put into circulation, as evidences of indebtedness, by *competent and legal authority*." And later the court says: "The bonds on their face import a compliance with the law under which they were issued." And in that connection, quotes with approbation and as authority, the language of Jervis, C. B. in delivering the judgment of the English Court of Exchequer, in these words: "We may now take it for granted that dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them *are bound to read the statute* and the deed of

settlement." And this court itself says: "The Act in pursuance of which the bonds were issued is a public statute of a State, and it is undoubtedly true that any person dealing in them is *chargeable with a knowledge of it*."

All the cases in this court are believed to proceed upon the principle, *probatis extremis, præsumuntur media*. There must be statutory authority and a due execution of that authority. These, the purchaser of municipal bonds is required to look into, but he is required to look no further. And intermediate acts or omissions are not a defence to an action on a bond which would have been a due compliance with the statute, if the necessary intermediate acts had been done.

It therefore becomes important to understand thoroughly the authority conferred by the act of February 10, 1853, assuming that act, for the present, to have been in force when the bonds were executed.

The authority granted by the Act of Feb'y 10.

The policy and to some extent the validity of municipal aid to extra municipal works, rest upon the increased prosperity to be derived from great public highways terminating in or passing through the municipality. This benefit is held to justify the taxation of the municipality, for the construction of works outside of it. And this is believed to have been made a condition in every Wisconsin statute authorizing such aid. And in granting such authority, strict limits are always assigned to it, and strict rules of its execution provided, to protect the municipal corporation against the improvidence or bad faith of its officers. And all these condi- will be found guardedly set out in the statute in question.

1. The authority is to subscribe a limited amount "to the capital stock of a railroad company authorized to construct a railroad *from the city of Racine to the village of Beloit*.

2. The authority is to pay for the same in the bonds of the town.

3. The authority is to make the bonds payable in *twenty* years.

4. The authority is to make the bonds payable, with interest payable annually, at a place certain, *not exceeding seven per cent*.

Here the terminus of the railroad within the town; the amount of subscription; the mode of payment; the time of payment; the place of payment; and the extreme rate of interest are all specifically determined for the protection of the town.

And on these guarantees, the people of the town were authorized to vote, and did vote, a subscription.

And this statute, with all these conditions precedent, to the issue of the bonds, every purchaser of the bonds was, in the language of the Chief Baron, adopted by this court, bound to read.

And reading, every purchaser of the bonds would know that the bonds were not an execution of the authority, in several most important particulars.

Railroad Co. not authorized to construct a road to Beloit.

1. The Racine, Janesville and Mississippi railroad company was incorporated by chap. 392, of the laws of 1852, April 17, 1852, a public statute in its nature and so declared to be in itself. It gives power to the company for, and declares the object of the company to be, "the construction of a railroad from Racine, in the county of Racine, by way of the village of Janesville, in the county of Rock, through the counties of Rock, Green, La Fayette and Grant, to the Mississippi river."

That was the only power of the railroad company to construct a railroad at the time of the passage of the act of February 10, 1853, of the subscription to its capital stock, of the issue of the bonds, and of all the transactions connected therewith, detailed in the pleadings and proofs.

The counties mentioned in the charter, except Racine, are part of the southern tier of counties in Wisconsin, running from a few miles east of Rock river to the Mississippi.

Janesville and Beloit were rival villages on Rock river, some twelve or fourteen miles apart. Janesville is nearly

due west from Racine and is situated two townships north of the Illinois line, equi-distant, or nearly so, from the north and south lines of Walworth, Rock, Green and La Fayette counties. Beloit lies upon the Illinois state line due south of Janesville.

The most cursory comparison of the line of road authorized by the charter, with the map of Wisconsin, will show that the Legislature designed the construction of a road running in a nearly due west line through the middle of the southern tier of counties, from the lake to the Mississippi.

A road leaning to the south, so as to strike the state line at Beloit, must, almost on first leaving Racine, diverge from the legislative policy indicated in the charter; and if continued westward through Rock, Green, La Fayette and Grant counties, must necessarily fail to fulfill the legislative design, west as well as east of Rock river. Indeed a road running from Racine to Beloit, if carried westward, must almost necessarily cross the state line at Beloit, and seek the Mississippi in a southwesterly route through Illinois. The proofs here show that such was the design and that design has been carried out.

Hence Janesville, as nearly midway between the lake and the Mississippi, as a prominent point could well be selected, was designated as a point in the line, to keep the road from diverging materially from the route contemplated.

It is no answer to our position to say that the railroad running southeasterly from Racine to Beloit, might then make an acute angle due north to Janesville, and thence westward follow the chartered line. It might as well be said that it might now follow its charter by returning northeasterly from Savannah to Janesville, and thence westward. Charters are now granted, and points fixed by them, in accordance with the public railroad policy, to be trifled with in that way. Railroads are meant to be direct thoroughfares, not chartered libertines. The designation of Janesville, as the point at which Rock river should be crossed, had a different purpose. *Expressio unius, exclusio alterius.*

And in point of fact, the journals of the two houses show that the Legislature, at the very session which passed the act of February 10, 1853, refused to pass an act authorizing this company to build their road to Beloit.

At the time therefore of the subscription to the stock of this company, and of the execution and delivery of the bonds to pay for it, it had no authority to build a road from the city of Racine to the village of Beloit. It had sought and been refused that very authority.

But in imitation of the audacity of great railroad companies elsewhere, this company undertook to dictate a policy to the state which created it, instead of receiving a policy from it; undertook to leave unbuilt the chartered road, and to build an unchartered one; and undertook, in executing with the officers of the town of Beloit, the authority of the act of February 10, 1853, to take a subscription of stock not authorized by that act; virtually forbidden by that act, and to receive for it securities not authorized by that act, virtually forbidden by that act, probably relying, upon the stale and false cant of repudiation, to induce good natured courts to sanction corporate defiance of state authority and corporate defeat of legislative policy, and to give judicial sanction to securities issued, not only without authority, but in defiance of authority.

So, having failed to obtain the legislative authority which it sought, to build a road from Racine to Beloit, it makes the agreement of May 21, 1853, with the officers of the town, to set its charter and the general laws of the state at defiance, and to build a road which it was forbidden to build, and to execute the act of February 10, 1853, by transactions prohibited by that act.

It is not irrelevant to notice in this connection, that so far as the election gave authority to the officers of the town, it was to subscribe to the capital stock of a railroad company, authorized to construct a railroad from the city of Racine to the village of Beloit, in the very words of the act.

These bonds are not merely unauthorized by legislative authority and therefore illegal; they are given for an illegal consideration, the building of a railroad not authorized by law. They are doubly vicious and illegal.

All this, the very name of the railroad company, as payee of the bonds, suggests; Beloit aiding a railroad to be built to Janesville.

All this, the defendant was bound to know, by the rule in this court, before he purchased his bonds. Indeed, independent of that particular rule, every man dealing in Wisconsin transactions, is presumed to know the public laws of the state. And this defendant must have known, it is enough for us that he was bound to know, that the railroad company had no authority to build such a railroad, as authorized the town of Beloit to subscribe to its stock. He must have known, it is enough for us that he was bound to know, that such a road, if built by this company, would be built in defiance of positive public policy, and in violation of positive public law.

All this, this court is called on by the defendant, to sanction and enforce. If the court should do so, it has a weary and humiliating work of recantation before it. If there be a court with an historical and noble character, for giving full effect to defined public policy and positive public law, and refusing to enforce contracts in violation of them, and resisting all appeals in favor of such contracts, made upon ideas of loose natural equity and false notions of natural morality, it is this court.

The bonds not payable according to the authority.

2. The authority given to the officers of the town, was to pay for the subscription "in the bonds of the town, payable in twenty years." The bonds are dated May 21, 1853, the date of the subscription, and were actually executed and delivered October 7, 1853. And they are payable February 10, 1873.

There is some force in the argument that the bonds were properly ante dated, as of the day of the subscription. It

appears to us however that the true construction of the act is, that the bonds should have full twenty years to run, that is, from their delivery. Had these bonds been made payable in the language of the act, in twenty years, and being thus ante-dated, they would nevertheless, never have been bonds payable in twenty years. There would have been a latent lie in them, in fraud of the act authorizing them. The twenty years would never have fully run during the life time of the bonds. It was the design of the act that the town should owe the principal sum for full twenty years, and have that full period of growth and preparation for their payment.

But we do not consider that question of material consequence. Neither from the date of subscription, nor the date of the bonds, nor the date of delivery, had these bonds twenty years to run. They were payable in twenty years from no date.

It will be noticed that the bonds do not mention the twenty years. They are simply made payable on the 10th of February, 1873. This, it will be observed, is twenty years after the passage of the act, under which it is pretended that they were issued.

Who was the brilliant father of the brilliant construction, that a legislative grant of authority to a corporation to issue its bonds payable in twenty years, meant bonds payable in twenty years from the date of the authority, not from the date of the bonds, is not known. It will be seen hereafter, that this queer construction was not accidental, but designed; not merely absurd, but vicious. But whoever was the father, the learned counsel on the other side saw fit to adopt this grotesque bantling.

It was argued in the court below, that the twenty years must signify *from the date of the act*, because to make it mean twenty years *from the date of the bonds*, would require the interpolation of those words; forgetting that the objection of interpolation would apply equally to either construction.

It was argued in the court below, that when an act provides that a certain thing be done, within a certain time, the time runs from the passage of the act. And so it does. But there it is the statute which runs, and not an instrument provided by the statute to be made. Here the direction of the statute is, not that the bonds shall be executed within twenty years, but that when executed, they shall be for twenty years. The bonds might have been executed at any time within twenty years from the passage of the act, or even after; but whenever executed, should have twenty years to run. According to the logic of the other construction, these bonds, if executed ten years after the passage of the act, should have been made payable in ten years; and yet be, in the language of the act, "bonds of the said town, payable in twenty years, with interest payable annually." The same argument would, we suppose apply to a negotiable note payable in ninety days, omitting the words, *from date*, and make it payable in ninety days from the passage of the statute of Ann. The trouble with the whole argument, is, that it is the bond, and not the statute, which is payable.

It is difficult to treat such an argument gravely; and we should be ashamed to argue the question at all, had we not before us the printed argument of the learned counsel, used in the court below.

If we are to descend, as the argument would lead us, into a minute verbal examination of the statute, that is with us, as well as the plain purpose of the statute. The bonds authorized by the statute are payable in twenty years, with interest payable annually. 'Annually' relates back to twenty years, and means annually for twenty years. And the rate of interest is seven per cent., not seven per cent. per annum, because the act contemplates just twenty annual payments of seven per cent. Had the legislature designed the bonds to be issued at an uncertain future time, payable in twenty years from the date of the act, so that the bonds would be payable in an uncertain number of years, with a probable fractional year, they would undoubtedly have said seven per cent. per annum.

But, it was further argued in the court below, as we understood, both in reference to the date of payment and the rate of interest, that, because this court had decided that the purchaser of such bonds need only look to the statutory authority and to the bond, and need not look to any of the intervening steps, it might have been assumed by a purchaser that the subscription was made and the bonds issued, under the authority of the act, after the passage of the act, but on the same day.

This involves the presumption that a week's notice of election should be given, the election held and canvassed, the subscription made and the bonds executed and delivered, within an unknown fraction of one day.

In the same connection, it was argued below, that the authority to subscribe for the stock was absolute, that the authority to issue the bonds in payment was the only qualified authority, dependent on the election; and that therefore the subscription might properly have been made on the day of the passage of the act; and the bonds, when voted, ante-dated to the day of subscription.

With great deference be it said, that is a very small quibble. The only subscription authorized was payable in bonds. The authority to subscribe, and the authority to pay, are a joint grant, a grant of dependent powers, expressed in a single sentence; "to subscribe to the capital stock of a railroad company, and to pay for the same in the bonds of the town." These are both contingent on the election; for if no bonds were voted, no stock could be subscribed. If this were otherwise, the supervisors might have subscribed to the stock, the town have refused the bonds, and the subscription have been payable, like any other subscription under the railroad charter, in money. This was not within the scope of the act. It would have been a violation of its spirit, if not of its very letter; and what is in violation of the spirit of a statute, is in violation of the statute.

If it be said that the variance between the power and the execution is slight, we answer that such a statutory pow-

er must be strictly followed; and that it is the fact of variance, not the extent, which vitiates the execution. Without legislative authority, these bonds are mere nullities. The authority was for twenty years, neither more nor less. The legislature saw fit to fix the credit of the bonds absolutely, without choice or discretion in any one. Why they did so, is for none of us to inquire. The bonds, to be statutory bonds, must follow the statute. The statute will not support a bond which does not follow it. If these bonds could be supported by the statute, so could have been bonds payable in ten years or in thirty.

It was a deliberate refusal to follow the statute. It is not merely a defective execution; it is a failure to execute.

Interest reserved beyond the authority.

3. Although contracts were then generally permitted by law, for any rate of interest, not exceeding twelve per cent., yet the Legislature saw fit to limit the interest of the bonds authorized by the act of February 10, 1853, to a rate not exceeding seven per cent., annually.

These bonds, dated May 21, 1853, executed October 7, 1853, bind the town to pay "interest thereon at the rate of seven per centum per annum, payable annually on the 10th day of *each* February ensuing the date hereof, until the said principal sum shall be paid, on presentation of the annexed interest warrants;" so that the body of the bond calls for a year's interest on the next 10th of February. And they had annexed to each, twenty coupons for full seven per cent. each, the first payable February 10, 1854.

Here we have again the same theory of the twenty years running from the passage of the act; and not only running, but running at interest, months before the bonds were authorized, dated or executed.

The election was held April 7, 1853; when it was voted to authorize the Supervisors to subscribe to the stock etc.; "and to pay for the same in the bonds of the said town, payable in twenty years, with interest payable annually in the city of New York, not exceeding seven per cent." *Record* 68.

There can be no pretence that before that election, there was any power to issue bonds under the act, and no pretence that the bonds could lawfully bear interest from any previous date.

The stock was subscribed for, May 21, 1853. That was the first relation of contract between the town and the railroad company. Then for the first time, if then, was there any liability of the town to the railroad company. There can be no pretence that this liability could legally bear interest from any previous date.

The bonds were executed and delivered, Oct. 7, 1853, by the Chairman, Clerk and Treasurer, under authority of a resolution not passed until Oct. 5, 1853. *Record* 72.

It does not appear how the delay occurred. Neither does it appear that the railroad company made any objection. They seemed to have given a credit or day of payment to that time. Under such circumstances, had the stock been payable in money, it is evident that interest would not have been asked and could not have been enforced. Then, as we think, the twenty years and the interest should have commenced to run together.

But *then*, by whom we do not know, the fraudulent device was put in practice, that the twenty years, time of payment and the interest for that time, began to run from the passage of the act, upon bonds not authorized under the act till April 7, 1853, not contracted for till May 21, 1853, and not actually executed till Oct. 7, 1853.

Under a usury law, no court would hesitate to declare this to be a mere device; the usurer's common vocation, shortening the time for payment and lengthening the time for interest.

And this excessive interest was not only contracted for, but appears to have been actually paid. The railroad company had undertaken, by the agreement of May 21, 1853, to pay the interest for the town until the road should reach Beloit; and it appears that the railroad company canceled

the first coupon, under that agreement. If so, that was a payment of the interest. *Record* 60.

If it be said that the excess of interest is comparatively small, we can only repeat, as was said before, that it is the excess of interest, not the amount of excess, which vitiates a contract. The legislature saw fit to limit the rate to seven per cent. absolutely, without choice or discretion to exceed that rate. These bonds were executed to draw a greater rate, paying seven per cent. for full twenty years, while they were payable months within twenty years. And they are not an execution of the statute nor protected by it.

There are degrees of crime, but everything criminal is a crime in its degree. Great and little violations of law are equally violations. If Eve had eaten the apple in the nineteenth century, we suppose she could have found some pathetic gentleman to plead for her, *de minimis non curat lex*, the apple was a very small one. The disobedience, not the apple, was the crime.

III.

THE BONDS ARE VOID FOR USURY UNDER THE PROVISIONS OF CHAPTER 172, OF 1851, LIMITING THE RATE OF INTEREST. Bonds void for usury.

This act, in force when the bonds were executed, enacts that the rate of interest shall be seven per cent. per annum, provided that parties may contract for a rate not exceeding twelve per cent., in which case such greater rate shall be clearly expressed in writing; forbids the taking of any greater rate of interest and declares all securities, except bottomry and respondentia, whereby a greater rate is reserved, taken or agreed upon, void; gives jurisdiction to courts of equity to compel discovery of usury and to decree the surrender and cancelation of all usurious contracts, without payment of any principle or interest, as a condition of relief.

These bonds are usurious on two grounds.

1. Because they reserve a greater rate of interest than seven per cent. per annum, without expressing the greater rate in writing; indeed disguising and suppressing it, under the false pretense of reserving only seven per cent.

2. Because the enabling act, of Feb. 10, 1853, and the interest act, taken together, provide that these securities, reserving a greater rate than seven per cent. per annum, are usurious and subject to all the provisions of the latter statute in relation to usurious contracts.

Quoad this transaction, the act of Feb. 10, 1853, rescinds the proviso of the first section of the interest act, permitting a greater rate than seven per cent.; and gives effect to the whole act, without that proviso.

The acts are perhaps not *in pari materia;* but the provision of the act, of Feb. 10, 1853, limiting the interest of these securities, is *in pari materia* with the interest law; together they form the law of this contract, and they must be construed together.

It was argued in the court below that all our objections to the rate of interest fell, because the interest had never been paid. Both statutes forbid the contract to pay; and the contract is void, not for the payment, but for the agreement to pay.

It was also argued below that the agreement of the railroad company to pay the interest accruing, until the road should be completed to Beloit, operated to cure all objections as to the rate of interest. That is a mistake also. The bonds were separate negotiable instruments, not controlled by the agreement, about to pass into the hands of third persons; and it is immaterial who was to pay the interest. The objection is that the interest was reserved. The agreement cannot operate to excuse the illegal rate reserved in the bond.

It was also argued below that because, in pursuance of the agreement, the railroad company cut off and canceled the

coupons maturing Feb. 10, 1854, that fact cured the difficulty. The bonds were valid or void at the instant of delivery. Good then, they could not afterwards become bad. Bad then, they could not afterwards become good. A penitent usurer cannot make good his void contract, by changing the rate of interest or by remitting it.

And, without statute to that effect, which there is not here, the taint of usury vitiates these bonds, in whose hands soever they may be. *Kelly on usury* 86. 2 *Parsons on contracts* 418.

IV.

THE BONDS CARRY, ON THEIR FACE, ADEQUATE NOTICE OF THEIR INVALIDITY.

Invalidity patent on the bonds.

Each bond has this caption: "by special authority of the State Legislature."

This *special authority* every purchaser was bound to read.

A purchaser had therefore notice on the face of the bond that the authority was to subscribe for stock in a company authorized to build a road from Racine to Beloit, and that the Racine, Janesville and Mississippi company, to which the subscription was made, had no such authority.

A prudent capitalist, seeking valid securities for a fair price, inevitably inquires into the authority of a municipal corporation to enter, outside of its ordinary powers and duties, into such transactions; and would compare the securities with the authority. So this court holds a purchaser bound to do.

And it is neither good sense nor good law for this defendant to plead ignorance of the laws governing the contract, in which he saw fit to invest his money. He is presumed to know the law under which he acts, and cannot plead ignorance of it in excuse for temerity or misfortune.

So a purchaser was bound to take notice that the bonds authorized to be issued, were bonds payable in twenty years. And no purchaser can claim a want of notice that these bonds were not so payable. The date of the bond and the day of payment fix that beyond dispute. And it is no answer to say, that a purchaser might have supposed that the principal of the bond might, by some fantastic possibility, have been due before the execution of the bond. If driven to such speculations, he was put upon inquiry and is chargeable with knowledge of all the facts in the transaction.

So a purchaser was bound to take notice that the bonds authorized to be issued, could not bear a higher rate of interest than seven per cent. per annum. And the bond on its face, reserves a year's interest for the interval between May 21, 1853, and February 10, 1854, payable on the latter day.

Indeed it would be perfectly safe to argue, if necessary, that the variance between these bonds and the authority to issue them, is so great and so frequent, that a purchaser was put upon inquiry into the entire transaction, and is chargeable with notice of the illegal contract of May 21, 1853, and of other things, of which the bonds themselves do not give actual notice.

The defendant is chargeable with notice, in another aspect. These bonds were dishonored when he purchased them. A part of them at least were lying with overdue coupons, in the bank of which he was president and of which he had charge, before he purchased them. And that was notice of the dishonor of the whole issue.

The truth is apparent enough that he is not a *bona fide* purchaser. He bought a lame security, for a lame price. And he stands more in the relation of a prowling assignee, than of a *bona fide* purchaser.

V.

Havemeyer vs. Iowa Co. considered.

It is most respectfully submitted to the court, that the decision of *Havemeyer vs. Iowa County*, 3 *Wallace*, 294, proceeds upon a misconception.

The main question in that case was, whether a statute of like tenor with the act of February 10, 1853, was a general law, within the meaning of the constitution of Wisconsin. This court held that it was not: and rested the decision upon two points.

First. The court held that the Secretary of State and Attorney General had decided that the act was not a general law, but a local act. This, we submit, is a misapprehension in fact.

Prior to chapter 504, of the laws of 1852, which went into force May 12, 1852, no distinction was made in the publication of different classes of laws. All were published indiscriminately in one volume.

That chapter provides:

"The laws passed at each session of the Legislature shall be divided by the Secretary of State and Attorney General, into two classes, which shall be published and bound in separate volumes. The first class shall include the laws of a general nature, joint resolutions and memorials: but no law incorporating a railroad, plank road or other company, shall be published therewith, unless such law specially requires that it shall be so published. The second class shall include all laws required to be published, which are not embraced in and published with the laws composing the first class. The title pages of the respective volumes shall express whether they contain the "acts of a general nature," or the "private and local acts and charters of incorporated companies."

The state constitution provides that "no general law shall be in force until published."

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not requiring publication: but only separates into two classes laws required to be published.

It will be further observed that the act of 1852, made no attempt to divide the laws into general acts and private acts. The technical words of the constitution, *general law* or *act*, are not used; but the untechnical phrase, *laws of a general nature*, is substituted. This change of language by the Legislature, in providing for a compliance with the direction of the constitution, cannot be accidental. The Legislature dropped the technical language of the constitution, because that technical language would have placed in the first class, statutes which they did not intend to belong to it. The phraseology clearly shows that the Legislature intended general laws, which could not be in force until published, to be published in the second class. This is further shown by their placing in the first class joint resolutions and memorials, which the constitution does not require to be published; and by their excluding all acts of incorporation, some of which must be, and most of which are, general laws. It is thus very manifest that the Legislature did not design the first class to be composed exclusively of general, laws nor the second class exclusively of private acts.

Statutes are divided into public or general, and private or special. *Sedgwick*, 30.

The opinion of the court suggests a distinction between statutes general, or local, in their character. It is submitted that the constitution, statutes and judicial decisions of Wisconsin, do not admit of this distinction.

Sec. 3, art. 4, of the consitution provides that "no private or local bill, which may be passed by the Legislature, shall embrace more than one subject and that shall be expressed in the title." The words, *private* and *local*, are here clearly used to designate different things. A statute changing a man's name, or giving him a statutory heir, is private. A statute incorporating a county, or a railroad, or establishing a highway, is local, if you please, but not pri-

vate. It is a general act, for it is of interest to the whole state and every citizen thereof.

In the very section before us, the Legislature makes the same distinction. It makes the title of the second class, "private and local acts and charters of incorporated companies."

This question was raised as early as 1850, within two years after the adoption of the State Constitution, and was disposed of by the court, in *State vs. Washington Co*, 2. *Chandler*, 247. The true principle is stated in the opinion of the late Chief Justice; "Geographically the law is local, politically it is not."

That principle is essential to the proper comprehension of the constitution, laws and judicial decisions of the state.

See on this subject *State vs. Lean*, 9 *Wis.* 279, 291. *Clark vs, Janesville*, 10 *Wis.* 136. *In re Boyle*, 9 Wis. 264. *Atty. General vs. Foote*, 11 *Wis.* 14. *Mills vs. Gleason*, 11 *Wis.* 470. *Rochester vs. Bank*, 13 *Wis.* 432. *Berliner vs. Waterlow*, 14 *Wis.* 378.

See also *Fowle vs. Alexandria*, 3 *Peters*, 409. *Hartford vs. Bridge Company*, 10 *Howard*, 533. *Sedgwick*, 32.

So, it appears, that the Secretary of State and Attorney General had no duty to decide that the act was a private, or a local law, not requiring publication. The duty of these officers was purely ministerial. *In re Boyle*, 9 Wis. 264. And it is difficult to understand why their act should weigh here, against the uniform rule of decision of the highest court of the state.

It has not even the weight of a habit of administrative state officers, for this was the first classification made. And the State Constitution expressly divests their acts of all judicial authority or weight. *Atty. General vs. McDonald*, 3 *Wis.* 805. See also 1, *Wheaton*, 329. 331.

In passing upon this point, this court says that it is not denied that the classification of 1853, was in accordance with the rule which had prevailed down to that time. That is of course a mere mistake of fact.

But, mistake it certainly is. It will be noticed that although the act authorizing the separate publication of the two classes of laws, was passed, it was not followed, in 1852; because it had no force as a law, until published. The first separate publication, was in this very year, 1853, and the most careless examination of the two volumes of that year, will show that the officers attempted no such classification, as the court assumes. In the very volume in which the act passed upon in that case, and the act here before the court, were published, will be found acts amending the charter of the city of Milwaukee, incorporating the city of Janesville, and to tax dogs throughout the state; the latter a very general act. While in the volume of general laws for that year will be found an act of the same tenor as the acts relating to Iowa county in that case, and to Beloit in that case, authorizing the supervisors of the towns of Bloomfield, Geneva, Elkhorn, Sugar Creek and Whitewater, in Walworth county, and Jefferson, Koshkonong and Cold Spring in Jefferson county, to subscribe to the stock of a railroad company, authorized to construct a road through those towns; and several acts, which one would certainly call private acts. There is in it also an act providing for a special election of county officers, in the counties of Washington and Ozaukee, consequent upon a division of the old county of Washington. That act was twice amended at the same session, and both amendments are published in the other volume.

And so the habit continued, and continues to this day. We give the titles of a few acts in each year, down to the year following the decision of *State vs. Lean*.

1854, PRIVATE AND LOCAL.

An act relating to paupers in the county of Rock.

An act to amend an act to incorporate the town of Platteville.

An act to extend the time for the collection of taxes in the city of Fond du Lac.

1854, GENERAL.

An act to authorize the Secretary of State to make proper entries in the books in his office for a final settlement with * * * * * * late Attorney General of this state, on account of canal land mortgages.

1855, PRIVATE AND LOCAL.

An act to organize certain towns in Adams county.

An act to amend an act entitled an act to incorporate the city of Racine in the state of Wisconsin.

An act to authorize the town of Benton in La Fayette county to make out a new assessment roll for said town for the year 1854.

An act to regulate elections in certain counties.

1855, GENERAL.

An act to change the name of Franz Otto Ransmann to Franz Otto Knapp.

An act to change the name of Anna Morley to Emma Carpenter.

1856, PRIVATE AND LOCAL.

An act directing and requiring the town of Benton, in La Fayette county, to raise two hundred dollars, state tax.

An act to incorporate the city of Madison.

An act to improve the navigation of Chippewa river.

1856, GENERAL.

An act to distribute the History of Wisconsin to the several school districts of this state.

An act to change the name of Eva Viola Keene to Eva Viola Gill and to constitute the said Eva Viola heir at law of Bolivar G. Gill, and Sarah S. Gill, his wife.

1857, PRIVATE AND LOCAL.

An act to amend an act consolidating the several acts relating to the city of Janesville.

An act to extend the time for the collection of taxes in the county of Oconto.

1857, GENERAL.

An act to authorize Hannah Jane Dutcher, a minor, to convey and devise real and personal property.

An act to change the names of certain persons therein named.

1858, PRIVATE AND LOCAL.

An act to amend an act to incorporate the city of Madison.

An act to extend the time for the collection of taxes in the city and county of La Crosse.

An act to legalize and provide for the collection of taxes in the county of Portage for the year 1857.

1858, GENERAL.

An act to authorize the judge of the sixth judicial circuit to appoint a place for holding the circuit court in the county of Buffalo.

An act to amend an act entitled an act to change the names of Elizabeth Brooks and Virginia Brooks.

1859, PRIVATE AND LOCAL.

An act to establish a municipal court in the city of Milwaukee.

An act to change the time for the election of city and ward officers in the city of Milwaukee.

An act to amend an act to incorporate the city of Green Bay.

1859, GENERAL.

An act to restore George Bryant to citizenship.

An act to authorize Wm. S. Huntington, a minor, to convey and devise real estate and personal property and to transact other business the same as he might lawfully do, if of legal age.

1860, PRIVATE AND LOCAL.

An act to restore Horatio Mains to citizenship.

An act to amend an act entitled, an act to consolidate and amend the act to incorporate the city of Milwaukee and the

several acts amendatory thereof, approved February 20, 1852, and to amend the several acts amendatory thereof.

1860, GENERAL.

An act to authorize the common council of the city of Milwaukee to erect a breakwater in the Third ward of said city.

An act to extend the time for the collection of taxes in the county of Marathon.

An act to amend chap. 252, of the local laws of 1858, entitled "an act to amend an act to incorporate the city of La Crosse.

We close the list in 1860, only because it shows that there was no change after the decision of the State vs. Lean. But the list might be carried down in the same way to the present time. And the court is not to think that this list is exceptional. It might have been extended to many times the length, and is purely exemplary.

It is self evident that, whatever may have been the rule which the state officers should have followed, no attempt was made to make such a classification as this court assumed that they had made. And all the weight given to their action falls out of the opinion of the court, the moment the misconception is exposed.

Second. This court said in its opinion that the question came incidentally under the consideration of the Supreme Court in *Hewett vs. Grand Chute*, 7 *Wis.* 282, and that the question in that case was whether a similar statute was pleaded as a private act should be. The act in that case was pleaded by its title; a good pleading of any statute in Wisconsin. So that it is difficult to see how the question

was before the court. It is true that the justice who delivered the opinion speaks of the act as a private statute, but the question was not before the court, could not be, whether the act was private or general; and the language relied on is mere *obiter dictum*, without influence or weight in this court. *Cohens vs. Virginia*, 6 *Wheaton*, 399. *Ex parte Christie*, 3 *Howard*, 392. *Peck vs. Jennes*, 7 *Howard*, 612. *Carroll vs. Carroll*, 16 *Howard*, 275.

So, we submit the court misconstrued the effect of *Hewett vs. Grand Chute*, and gave to it a weight, to which it is not entitled by the rules of decision in this court.

And if not furnishing a rule of decision in this court, it certainly had no vitality to aid a defective contract.

And this is more obviously true, because the supreme court of the state uniformly decided such a law to be general, whenever the question came directly before it, both before and after.

And indeed it seems to us to be another misconception, that *Hewitt vs. Grand Chute*, was the first decision on the subject, or stood alone at the time. *The State vs. Washington County*, was the earlier and better decision ; more than sufficient to neutralize any incidental authority of Mr. Justice Smith's loose language in *Hewitt vs Grand Chute*.

We do not assume here to argue again the questions discussed at the bar in *Havemeyer vs. Iowa County*. We have only endeavored to show that the decision of that cause rests upon misconceptions of fact and law, and ought not to prevail to force a constitutional rule of decision upon the state, against the plain letter of our constitution and laws, and the uniform rule of her judicial decisions.

If permitted to argue those questions, we are prepared to do so in full confidence, because great men and great courts are always ready to admit and redress error.

VI.

THE BONDS WERE ISSUED WITHOUT VALID CONSIDERATION.

Stock subscribed for void.

The stock received for the bonds, under the agreement of May 21, 1853, was void. Any stockholder had a right to have it canceled.

Indeed, the agreement is vicious in almost all its provisions, and taints all its surroundings with fraud.

We do not make this point to avoid the bonds in the hands of a *bona fide* purchaser, but to show that the points made to avoid the bonds, are meritorious.

The whole transaction must be judged as it was at the time, not as it is now. It may be true, as the answer states, that the railroad company went to speedy perdition. So reckless in its dealings, it was likely to do so. But, had it not, had the stock remained good, there can be no doubt that the shares received for these bonds would have been impeached and canceled.

VII.

NO SUBSEQUENT ACT OF THE LEGISLATURE RATIFIES THESE BONDS.

Void execution of authority not cured by legislative ratification.

The acts relied on by the defendant, as a ratification, are acts incorporating the city of Beloit, out of the old town of Beloit, and amending the charter. The language of both acts, so far as it applies, is identical.

"All principal and interest upon all bonds which have heretofore been issued by the town of Beloit for rail road stock or other purposes, shall be paid, when the same or any portion thereof shall fall due, by the city and town of Beloit, in the same proportions as if said town and city were not dissolved." *Private Laws*, 1856, 991; *Private Laws*, 1857, 437.

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No ratification expressed or understood by the legislature.

1. It is very certain that the legislature could have had no intention, by this provision, to legalize the unauthorized issue of the bonds, or to ratify the bonds.

The attention of the legislature was directed to a very important and comprehensive subject: the erection of a city in a territory, before subject to the rural government of towns. And, in doing this, it had an equitable rule to establish for the division of the public debt of the old municipality. What that public debt was, how incurred, whether just or unjust, whether valid or void, were all questions outside of the legislative purpose and intention.

If the legislature had a purpose to ratify these bonds, it would undoubtedly have expressed that purpose in language as plain as that in which it granted the authority.

We know of no rule of statutory construction which gives to a statute any meaning not expressed upon its face. Even the doctrine of constructive repeal rests upon the positive declaration of the legislative will. A statute to ratify a void contract, must be as explicit as any other statute; must be as explicit as a deed of confirmation.

The legislature must have in its mind the contract to be ratified, the invalidity to be cured by a ratification, and must express that purpose in as plain language as any other; so that all the world may know what it means.

Here, had the subscription never been made, and the bonds never issued, it might as well be argued that the provisions quoted above, would operate to create the bonds, as, having been issued, to ratify them.

And the phraseology of the legislature leaves open all the questions argued in this cause. "All bonds which have been heretofore issued," means bonds validly issued; bonds issued by authority. "Shall be paid when the same shall fall due," refers to the payment of valid bonds: *nuda pacta* never fall due. The legislative idea was, not what bonds of the town were outstanding, nor of what validity; but in what proportion valid, outstanding bonds should be paid by the city and town.

So far as we know, every adjudication in favor of the ratification of a void instrument, or the cure of a void execution of a power, has gone upon a clearly expressed intention of the legislature, to do the very thing which it was claimed they had done. This is the first instance, within our knowledge, where it has been attempted to entrap a legislature into such a ratification, by implication, or to give validity to a void contract by a mere incidental and accidental allusion of a statute.

Legislative ratification inoperative without consent of parties.

2. Without entering, at this place, into any discussion of the power, anywhere, to confirm a contract, void, not voidable; or of the effect of retrospective legislation in civil matters, we submit that a statute cannot operate as a ratification of a void contract, without assent of both the parties. It is for the legislature to authorize the contract; but it is for the parties to contract. And if, being so authorized, they attempt to make a contract not within the authority, it is as if they had refused to contract. There is no contract to ratify or confirm. And if a legislative act could operate as a ratification, making valid what was before void, it is the legislature which makes the contract, not the parties.

This point is very elaborately settled by the Supreme Court of Wisconsin, in *Hasbrouck vs. Milwaukee*, 13, *Wis.* 37.

The city of Milwaukee had legislative authority to build a harbor, at a cost of fifty thousand dollars. It adopted a plan, and made a contract, within that limit. Subsequently, it changed the plan and contract, for a new plan and contract, involving a far greater expense. After the making of the new contract, the legislature passed several acts increasing the amount, authorized to be expended. But the Supreme Court held that these acts could not ratify the contract without the assent of the parties.

Subsequently the Court held that the parties had acquiesced, and thereby ratified the contract, under legislative authority, but re-affirmed the same doctrine, 21 *Wis.* 217.

We submit that this is the law of this case.

Cases of retrospective legislation in this court.

We are not unaware of decisions in this Court, giving effect to retrospective statutes. *Satterlee vs. Matthewson*, 2 *Peters*, 380; *Watson vs. Mercer*, 8 *Peters*, 88; *Charles River Bridge vs. Warren Bridge*, 11 *Peters*, 420, were all writs of error to State courts, in which this Court could and did only decide that there was nothing in retrospective State legislation, in civil matters, in conflict with the constitution or authority of the United States.

Wilkinson vs. Leland, 2 *Peters*, 627, and *Leland vs. Wilkinson*, 10 *Peters*, 294, are repetitions in this Court of the same case. The plaintiffs claimed title, in Rhode Island, as heirs of the executrix of a will made by a testator in New Hampshire, and proved in the proper court of that state; under which she sold the premises in dispute to the defendants, for the purpose of paying debts, without authority from the proper court in Rhode Island. She then bound herself by a covenant to procure from the legislature of Rhode Island, an act ratifying and confirming the title so granted; accordingly petitioned the legislature of Rhode Island for such an act; and on her petition, such an act was accordingly passed. The act distinctly and in technical terms ratified and confirmed the sale and deed. Her heirs claimed, on the ground that her deed was void, and that the legislative ratification was unconstitutional.

In that case, the court gives full effect to the retrospective act of ratification. In the first report, the court dwells chiefly upon the lien given by the laws of Rhode Island to the creditors of the testator, as a *right*, independent of the deed and of the ratification; plainly intimating that the ratification rested upon a previous right, existing independently.

That is clearly distinguishable from the present case, where the ratification is relied on to give a right, not previously or independently existing.

In both reports the court relies largely upon the extraordinary powers of the legislature of Rhode Island, unrestrained by any written constitution. In the second report, the court goes so far as to say: "In this respect the power of the leg-

islature of Rhode Island is greater than the strictly judicial power; for they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future."

Thus, that case is based on local law, having no application to the case before the court.

It is submitted that this is an exceptional case, greatly lessened in its authority by the dissenting opinion of Mr. J. Johnson, delivered at the same term, in *Satterlee vs. Matthewson*, and his subsequent note on that case, and had better have been rested on other grounds. It is a decision of local law, and the principles upon which it is given have no application to the present case.

In *Thomson vs. Lee County*, 3 *Wallace*, 327, an act was passed by the legislature of Iowa, "Legalizing the issue of county, city and town corporation bonds, in the counties of Lee and Davis," and providing that "the bonds issued, &c., shall be a valid lien upon the taxable property of said county." *After*, not *before*, the passage of this curative act, the bonds in suit were issued.

The original authority of law had been conditional on an election, held to have been irregular; and to cure that, the legislature, which might have given the authority to issue the bonds without election, gave a new authority to issue them notwithstanding the irregularity of the election; and under that authority the bonds were issued.

This was held to be a ratification, not, as we understand it, of the bonds, but of the authority.

It is submitted that here was nothing to ratify, no ratification intended or expressed by the legislature, no assent or ratification by the parties, no salvation of these bonds by legislative confirmation.

VIII.

Bonds not ratified by the appellant.

THE PROOFS DISCLOSE NO ACT OF THE TOWN, OR OF ITS OFFICERS, WHICH OPERATES AS A RATIFICATION.

It appears to us an absurdity to assume, that, when municipal corporations do acts clearly outside of their delegated authority, they can themselves give validity to such acts, by ratification. On such a principle, a corporation might assume any power, at pleasure, do void acts under it, and assume to itself the power it had not, by acts of ratification. We take it that a municipal corporation cannot, by its own act, validly ratify a contract it had no power to make.

It is true that, in *Mills vs. Gleason*, 11 *Wis.*, 470, the Supreme Court of the state held that the receipt and expenditure of the money, the avails of the bonds, after the authority to issue them had become a law, were a ratification. But in that case the validity of the bonds was not directly before the Court. The question before the Court was the validity of a tax; and the case really rests on the general power of the corporation to borrow money, in force when the money was received, and the tax levied to pay for it.

It seems very safe to assume that, when, from mistake, improvidence, or bad faith, the officers of a municipal corporation exceed their powers to contract for it, they can give no validity to the contract by their own mere acts. It would be idle to limit their power to contract, if they could ratify contracts beyond their power. Want of power to contract is want of power to ratify. This was expressly held by the Supreme Court in *Rochester vs. Alfred Bank*, 13 *Wis.*, 432. See also *Clark vs. Janesville*, 10 *Wis.*, 136, and *Berliner vs. Waterloo*, 14 *Wis.*, 378.

So the action of the Supervisors in assenting to a consolidation of the railroad company, (*Record*, 66, 70, 76,) goes for nothing. Even in the case of private persons, such a mere assent to a collateral thing, would not have the effect to ratify a bond or covenant, though only voidable.

So the appointment by the Supervisors of a commissioner to vote on the stock, (*Record*, 75,) has no effect to ratify This point is directly settled in *Rochester vs. Alfred Bank*.

The resolution of the town meeting of 1853, (*Record*, 71,) authorizing a sale of the stock at par, is the least defensible of all the acts of the town, in a moral point of view. It was an offer to put in market, at apparent par value, stock of more than doubtful validity: and by the terms of the act of February 10, 1853, to keep the money realized to await the maturity of the bonds, and pay them. But it is submitted that it is no ratification of the bonds, to endeavor to obtain from the securities received for them, their amount, and hold it for the bondholders. That would have been one way of undoing the transaction; this bill is another way.

Had the sale been made, and the money received by the town, and had the defendant sued for the money, the question would arise of his right to recover it. But the sale was not made, and the questions are now different.

The resolution of the town meeting of 1854, offering to surrender the stock for the bonds, had no tendency to ratify the bonds. Where one has exchanged with another void securities, it is highly proper to offer to re-exchange them; and of the two, this looks more like repudiation than affirmance.

The resolution adopted at the town meeting of 1856, (*Record*, 75,) authorized the taking up of the bonds, and the substitution of others in their stead.

Had the defendant accepted the offer, and received the new bonds offered to be issued, the question would arise how the offer, its acceptance and execution, might have given validity to the new security substituted for the void security.

But the resolution itself looks more like disaffirmance than affirmance. It was but another mode, a little indirect, of tempting the bondholders to exchange the bonds for stock. And the offer to make the exchange at the expense of the bondholders, shows that the people thought that the bondholders were at fault, not the town.

And it is submitted that such offers, made by a private person, acting in his own right, would have no operation to ratify an illegal or void contract. Much less so, in the case of a town meeting, acting for those present as well as absent; for residents entitled to be present, as well as non-residents not entitled to be present.

These resolutions were all mere offers, never accepted or acted on; and like all other offers of compromise or settlement, have no effect to preclude the party making them, or to ratify the contract they offer to compromise.

But a higher and better answer to all these arguments of ratification *in pais*, is, that a contract void for illegality, is incapable of ratification. Where the taint of illegality, the taint of violation of positive law, once attaches to a contract, it may not only be ratified, but merged in a new contract not otherwise so tainted; but the taint survives to vitiate all ratification, and all new contracts growing out of it.

IX.

Confirmation must be by deed, and cannot give validity to a void deed.

IN LAW, NONE OF THESE ACTS OF THE TOWN OR ITS OFFICERS COULD OPERATE AS CONFIRMATION, EVEN IF SO INTENDED AND EXPRESSED.

1. Confirmation is direct, or implied by law; in either case, by instrument of the same solemnity as the instrument confirmed. *Coke, Littleton*, 295, *b.*

And these bonds could be ratified only by deed.

2. The bonds were void, not voidable. *Confirmatio est nulla, ubi donum præcedens est invalidum. Coke, Littleton*, 295, *b.*

X.

OUR CASE IS NOT PRECLUDED BY ANY PREVIOUS ADJUDICATION. Points made are open questions.

Bushnell vs. Beloit, 10 *Wis.*, 195, was relied on in the court below, as conclusive of the validity of these bonds.

An examination of that case will show, that it turned on entirely different points, and that no single question here argued, was disposed of by the court. The points which we make are open questions.

And it is not deemed necessary to argue that the judgment by default, pleaded in the answer as an estoppel, has no such effect.

XI.

NO TERMS SHOULD BE IMPOSED ON THE APPELLANT. Decree to be without terms.

Although courts sometimes impose terms in decrees for the surrender and cancellation of securities, no terms can be imposed here.

1. Because no valid consideration was received for these bonds from the payee, and none at all from the defendant.

2. Because the decree, if we should obtain one, will go upon the nullity of the bonds, for apparent and positive violation of the public law.

We have argued this case in vain, if we have not shown that the wilful holder of such bonds is entitled to no indemnity from the town, which received no valuable consideration, for the unauthorized and illegal execution of the bonds by its officers.

THE TOWN OF BELOIT,
Plaintiff in Error,

vs. } No. 329, Dec. T., 1868.

SAMUEL C. MORGAN,
Defendant in Error.

This is a writ of error, from a judgment at law, recovered by the defendant in error, on coupons of the same bonds.

All the points made in the equity case, against the validity of the bonds, apply in this case; and of course will not be here repeated.

I.

Plea in abatement.

The defendant below pleaded in abatement, the non-joinder of the city of Beloit, as a defendant. To this plea the plaintiff below demurred, and the court below sustained the demurrer. (*Records*, 59, 60, 61.)

It is submitted that the plea was well taken.

A number of cases in the courts of the New England states, were cited on the other side, in the court below. These cases go upon the principle, that, upon the division of a town, the former corporation, that is the town retaining the old name, is the party to sue and be sued, upon the transactions of the old town, unless the legislature declare a different rule.

It is submitted that the legislature, here, has done so.

The division was effected by the charter of the city of Beloit, which (*Section* 17, *Chap.* 10) provides that the bonds of the old town of Beloit shall be paid by the city and town, in the same proportions, *as if the town and city were not dissolved;* such proportions to be apportioned as provided in Sec. 16. Sec. 16 provides for a *joint* payment, each pay-

ing the same proportions upon their assessment rolls, the same as though said city and town were not divided. See *Springfield vs. Rail Road Company*, 4 *Cushing*, 63.

It seems to us a bad argument that the town retaining the old name, is the proper party to sue and be sued, because, if a town be divided, and both new towns receive new names, there would be nobody to sue or be sued. There are bonds out, of a town in Wisconsin, which has ceased to exist *eo nomine*, being wholly merged in a city and two other towns. To whom are the bondholders to look?

II.

After the demurrer to the plea in abatement had been sustained, the defendant below pleaded several pleas in bar; amongst the rest, the statute of limitations to the coupons declared on. (*Record*, 68.) To this plea, the plaintiff below put in a general demurrer. (*Record*, 70.) The demurrer was sustained by the court. (*Record*, 72.)

We suppose it to be the settled law of this court, that the coupons are contracts, separate from the bonds. The title to them may be in different persons. And separate suits may be brought on the coupons and on the bonds, by the same or different persons, and assumpsit will lie upon the coupon, while the bond must be sued in debt. *Thomson vs. Lee County*, 3 *Wallace*, 327.

If this be so, the statute of limitations must have run against the coupons, as independent contracts, without reference to the bonds. The presumption of payment, on which the statute rests, is not suspended as to the coupons, by the immaturity of the bonds. The six years of the statute commences to run from the maturity of the coupon, not from the maturity of the bond.

It was argued below that, under the peculiar frame of some of the counts in the declaration, (*Record*, 3,) the plaintiff below was entitled to recover interest on the bonds, by force of the bonds themselves.

To this there are two answers.

1. By the terms of the bonds, the interest is payable only on presentation of the coupons. In the absence of the coupons, the presumption is that the interest is paid, or is payable to some other person holding the coupons.

It would be very absurd to adjudicate that the holder of the coupons, as such, has a title in the coupon, and is entitled to recover the interest, and that the holder of the bond, by force of the bond, is entitled to recover interest also.

2. The argument has a double effect. If well taken, the coupons were improperly admitted in evidence, under exception of the plaintiff in error. (*Record*, 77.)

In either view, the judgment must be reversed. If the recovery rested on the coupons, they are barred by the statute. If the recovery rested on the bonds, the coupons were improperly admitted.

III.

There are numerous exceptions in the record, taken on the trial by the plaintiff in error, the merits of which are discussed in the equity case. It is not deemed necessary to refer to them particularly here.

H. L. PALMER.
E. G. RYAN.